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UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 31

SEIU UNITED HEALTHCARE WORKERS - WEST, Charging Party, and PRIME HEALTHCARE CENTINELA, LLC – d/b/a CENTINELA HOSPITAL MEDICAL CENTER, Respondent.	Case No. 31-CA-140827
SEIU UNITED HEALTHCARE WORKERS - WEST, Charging Party, and PRIME HEALTHCARE CENTINELA, LLC –	Case No. 31-CA-140844

d/b/a CENTINELA HOSPITAL MEDICAL CENTER, Respondent. SEIU UNITED HEALTHCARE WORKERS - WEST, Charging Party, and PRIME HEALTHCARE CENTINELA, LLC – d/b/a CENTINELA HOSPITAL MEDICAL CENTER, Respondent.	Case No. 31-CA-141016

BRIEF IN SUPPORT OF CHARGING PARTY'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

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I. INTRODUCTION

These Cross-Exceptions are filed by the Charging Party in part because the remedy and conclusions are inadequate. We detailed those issues below:

II. THE ALJ FAILED TO FIND THAT SCHOTTMILLER LIED.

The ALJ found that Ms. Schottmiller was not "credible on this point." She often detailed how her explanations were "vague, evasive, confusing, and inconsistent . . . ." *See* ALJD p 7: 36-41. The ALJ detailed the proof she lied. ALJD p 8: 1-21. Obviously Ms. Schottmiller intentionally did not tell the truth. Finding her not credible is not good enough. The ALJ should have found that she lied. The Board should also find that Schottmiller lied.

III. IN PARTIAL AGREEMENT WITH RESPONDENT, THE PARTIES REACHED AN AGREEMENT TO ELIMINATE THE CALIFORNIA DIFFERENTIAL FROM THE COLLECTIVE BARGAINING AGREEMENT

The ALJ erroneously found that the parties had failed to reach an agreement to eliminate the California Differential from the collective bargaining agreement. *See* ALJD p 13:14-14:15. To the contrary, the parties agreed to eliminate it. This agreement eliminates the other issues raised by Respondent in its Exceptions.

We quote from our Brief to the ALJ:

> Between mid-day on November 7 and the early morning on November 8, Reddy, Mike Sarian, Prime's President of Operations, Mary Schottmiller, Prime's Senior Labor Counsel, and Turzi participated in negotiations with UHW by telephone. Reddy, Sarian, and Schottmiller were gathered together in Prime's corporate offices in Ontario, California until at least midnight. (Tr. 382:1-25). Turzi participated by telephone from his office in Washington, D.C. (Tr. 382:18-20; 384:4-6). For most of the time on November 7, the negotiations focused on an arbitration provision in the MOU. (Tr. 385:10-17).
>
> By 11:00 p.m. on November 7, the parties agreed to tackle other outstanding issues involving the MOU. (Tr. 385:23-25; 386:1). One of the issues the parties tackled on November 7 involved the master CBA covering workers at Centinela, Encino, and Garden Grove. The parties agreed that Schottmiller, representing Prime, and Greg Pullman, UHW's Chief of Staff, would work out the terms of an agreement covering the three hospitals. (Tr. 386:2-5).
>
> Over the course of the next few hours, Schottmiller and Pullman negotiated the terms of a collective bargaining agreement that covered Centinela, Encino, and Garden Grove. Schottmiller preferred to negotiate by e-mail and wanted to put everything in

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> writing to avoid any disagreements. (Tr. 386:13-25; Resp. Exh. 24). Schottmiller sent Pullman the first proposal of the night. (Resp. Exh. 24).
>
> Schottmiller's proposal included a dozen or so issues that needed to be resolved in order to reach a CBA for the three hospitals. One of the issues included the elimination of the "California differential." The California differential covered only a subset of UHW represented workers at Centinela. (Tr. 416:19-25; 374; 375:1-4). Prime wanted to eliminate the California differential.
>
> In response to Schottmiller's proposal, Pullman proposed to deal with the differential after the parties had reached an agreement. Prime, however, wanted the differential eliminated immediately upon implementation of the agreement. (Resp. Exh. 24). According to Schottmiller, Prime's motive for immediately eliminating the California differential had to do with wanting to wrap up everything at once; it had nothing, however, to do with any potential liability to Prime. (Tr. 387:23-25; 388:1-4).
>
> According to Schottmiller, in response to Pullman, she "mistakenly" represented to him that the parties had already reached agreement on eliminating the California differential during a bargaining session on October 24. (Tr. 389:11-17). At the hearing, Schottmiller explained that she made the mistake because: the negotiations took place in the middle of the night; she had been "doing 20 negotiations at once"; and based on her memory, she had already explained what her proposal was to the Union on October 24, and she believed that the Union had agreed to it. (Tr. 389:21-23; 390:17-19).
>
> By 2:18 a.m. on November 8, Schottmiller and Pullman concluded their negotiations and had reached a tentative agreement covering the Centinela, Encino, and Garden Grove bargaining units. (Resp. Exh. 46). In the final version of the tentative agreement, the Union agreed to the immediate elimination of the California differential at Centinela. (Tr. 121:10-13; 128:6-7). The agreement was only tentative, however, because it was only one component of the MOU, and the parties had yet to reach an agreement on the MOU as a whole. At 3:35 a.m., Pullman e-mailed Collis and Schottmiller the final version of the tentative agreement for the three hospitals. (Resp. Exh. 47).

Charging Party's Brief at pp. 4-6.

Thereafter as found by the ALJ the parties confirmed that there was a complete agreement:

> After receiving Pullman's e-mail, Schottmiller took her time and reviewed the attached agreement, term by term, and verified that the document accurately reflected the agreement that the parties had reached. (Tr. 410:1-22). At 12:41 p.m., Schottmiller e-mailed Pullman and stated, "We are good to go. I'm in negotiations today, so I will sign tomorrow. If you want to sign and send to me today, I

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> can sign first thing tomorrow morning." (Jt. Exh. 2 at 43). Schottmiller also requested that Pullman cancel three days of negotiations that had been previously scheduled for Centinela, Encino and Garden Grove for the week of November 8. (*Id.*)
>
> In light of the agreement, Pullman responded to Schottmiller that he would cancel the bargaining sessions for the week of November 8; and he explained that Richard Ruppert would contact her to verify that the parties were implementing the correct wage scales to effectuate the terms of the new agreement. (Resp. Exh. 55; Tr. 106:2-4; 107:4-8).
>
> At 3:32 a.m. on November 11, Schottmiller responded to an e-mail from Pullman, informing him that Prime was "running the numbers on the health care premiums and will send as soon as I get it." (Resp. Exh. 61). In the three hospitals agreement, Prime had agreed to reimburse health care premiums for Centinela employees. (Jt. Exh. 2 at 51).

Charging Party's Brief at p. 8.

We then pointed out:

> Also on the morning of November 11, at 8:39 a.m., Ruppert e-mailed Schottmiller in an effort to discuss the wage scales and California differential. (Resp. Exh. 59). In his e-mail, Ruppert noted that the parties had agreed to eliminate the California differential, and acknowledged that he had no authority to bargain anything further, noting that he was "not trying to bargain the settlement proposal but we both have to be clear on the CD settlement." (*Id.*).
>
> At 12:41 p.m., Schottmiller had received an e-mail from Pullman, at 12:41 p.m., asking her why she had not yet signed and returned the agreement as promised (Jt. Exh. 4 at 59). Schottmiller responded to Pullman and explained that Prime "cannot sign the attached [three hospitals agreement] until we reach agreement on the Daughter's deal." (*Id*). Schottmiller then responded to Ruppert's 8:39 a.m. e-mail, without addressing the substance of it, instead stating that she had "just let Greg know that we cannot agree to the three contracts until we reach an agreement on the Daughters." (Resp. Exh. 59).

Charging Party's Brief p. 9.

There is no doubt that Charging Party agreed with Respondent's proposal to eliminate the California differential. Prime cites the Union's position in its Brief in Support of Exceptions at pages 15-16. As Respondent states:

> ALJ Thompson's finding of an agreement based on the existing status quo is clear error as it is at odds with the position of both parties to the alleged agreement."(Emphasis in original).

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See Respondent's Brief at p. 16.

Prime reemphasizes this:

> The parties had agreed that the California Differential was an exception to the status quo. (RC-6 at 3) Consistent with that exception, the parties sought to change, and ultimately believed they had changed he status quo. . . . .
>
> **ALJ Thompson ignored the undisputed evidence that the parties expressly excluded California Differential from the status quo stipulation.**"

Respondent's Brief at pp.16-17 (Emphasis in Original).

We were clear that the parties had agreed to eliminate the California differential from the collective bargaining agreement. The ALJ's confusion may have arisen from the fact that the agreement stated: "The California Differential solution agreed upon at Centinela will be included." Jt. Exh. 2 at p. 51; *see also* Respondent's Brief at p. 11. That reference referred to the parties' agreement to *exclude* and *eliminate* the differential as requested by Prime. Or, perhaps, the ALJ's confusion is based on a mistaken belief that because the parties did not detail the elimination would be implemented, then there was no agreement to eliminate the California differential. Implementing the agreement to eliminate the differential was simply a matter of wage calculation, taking into consideration the wage increases that were also agreed upon by the parties. What is undisputed is that the Union, through Mr. Pullman, accepted Prime's proposal to eliminate the California differential as Prime had demanded throughout the negotiations. *See* Tr. 108:22-25; Tr. 109:3-4.

Moreover, throughout these proceedings, Prime has been dishonest and disingenuous about this issue.

> Prime's approach to this case has been to throw everything but the kitchen sink into its defense. This approach is best illustrated by Prime's claim that parties did not have a "meeting of the minds" with respect to the California differential. Prime never raised any issue with UHW regarding the differential in 2014. The first time Prime ever raised this defense was at the hearing in this matter. Prime's specious claim should be rejected for multiple reasons.
>
> First, Prime and UHW reached a complete agreement on November 10, 2104; and the parties understood that they had reached an agreement on all substantive and material terms. Schottmiller acknowledged as much at the hearing. (408:10; 411:8-11). The

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Board has noted that the "tone and temperament of the parties" can be indicative of a complete agreement. *Windward*, 346 NLRB at 1150-51 (citing *Brooks, Inc. v. ILWU*, 835 F.2d 1164, 1169 (6th Cir. 1987)). Here, Schottmiller's own words, forever captured in e-mail, clearly indicate that the parties had reached a complete agreement. Schottmiller's actions confirm the same as well. As late as 3:32 a.m. on November 11, Schottmiller had notified Pullman that Prime was "running the numbers on the healthcare premiums" that were to be reimbursed pursuant to the agreement. (Resp. Exh. 61).

Second, and more importantly, in order to accept Prime's argument, one must ignore the fact that prior to agreeing to sign the agreement, Schottmiller read over the proposed agreement, term by term, on multiple occasions. (410:1-22). In *Ebon Servs.*, a case that closely resembles the instant matter, the employer "refused to sign a contract in part on certain real and alleged discrepancies between terms that had been discussed . . . and terms contained in the contract presented by the Union." 298 NLRB at 219, fn.2. The Board rejected the employer's defense that there was no "meeting of the minds," because the employer's vice president "reviewed all the terms of the contract . . . and agreed to sign it." *Id.*; *see also Windward*, 346 NLRB at 1151 (rejecting employer's "meeting of the minds" defense, because the employer admitted to reviewing the disputed language on multiple occasions, "and never once disputed its accuracy" during its review).

In this case, Prime's negotiator and Senior Labor Counsel reviewed the proposed agreement, term by term, on multiple occasions, and at the direction of Prime's CEO, agreed to execute it. After one review, Schottmiller even suggested clarifying one of the provisions, which UHW did. (Jt. Exh. 2 at 43). Schottmiller then reviewed the agreement again, term by term, and did not raise any objections regarding the California differential. (Tr. 410:1-22). In fact, not once during any of her multiple reviews of the agreement did Schottmiller suggest that the term dealing with the California differential was in any way inaccurate. Simply put, Prime agreed that the terms accurately reflected the parties' agreement; and, thus, there is no justification for Prime to have refused to sign the agreement.

Third, the real reason that Prime refused to the sign the agreement had nothing to do with the term dealing with the California differential. As Schottmiller explained to Pullman, and reconfirmed through her testimony, the only reason that Prime refused to sign the agreement was because Reddy, Prime's CEO, wanted to condition the three hospitals agreement on the "Daughters' deal." (Jt. Exh. 4 at 59). See Ebon Servs., 298 NLRB at 224 (rejecting meeting of the minds argument where the evidence was "clear that Respondent's refusal to execute the contract did not hinge . . . [on] any . . . discrepancies"). Prime has manufactured the very idea that there was no "meeting of the minds" in order to avoid liability in this matter.

Charging Party's Brief at pp.15-17.

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Prime knew that it had secured the Union's agreement to eliminate the California differential. It made that argument in its Brief to the ALJ. Its effort now to claim that there was no agreement on that issue is dishonest but consistent with the dishonesty and bad faith it has exhibited throughout the negotiations and Board proceedings. Indeed, it is quite bizarre and patently unbelievable to argue that a term, which the employer, itself, sought to eliminate to its advantage, was not part of the final agreement, even when the Union concedes all along that it had agreed to that concession. When has an employer ever argued that a Union did not grant a concession to its advantage? It only happens when a dishonest and disreputable employer tries to avoid the consequences of an agreement it no longer wants to be bound by.

The ALJ's mistake should be corrected. The parties agreed to eliminate the California differential.

IV. THE EMPLOYER'S CONDUCT VIOLATED SECTION 8(d)

The ALJ failed to find that the employer's conduct violated section 8(d). Although the ALJ found that the conduct of the employer violated Section 8(a)(5), she did not find that it also violated section 8(d). That provision of the Act specifically requires that employers execute an agreed upon agreement, and it failed to do so. The conduct thus additionally violates section 8(d).

V. THE REMEDY IS INADEQUATE

The remedy is inadequate on a number of grounds.

First, the ALJ found that "the violations Respondent committed are serious and the defense lacks merit." She looked beyond this case to find that "Respondent's violations are not so numerous, pervasive and outrageous" that any additional remedies are required. That is not the test. Here, the violation interfered with collective bargaining and caused additional costs and litigation fees. It struck at the heart of the collective bargaining process. The employer's witnesses lied to try to justify their conduct. The following remedies are appropriate.

1. Bargaining Costs.

As a result of Prime's bad faith bargaining conduct, UHW should be awarded bargaining costs beginning from November 10, 2014, the date that Schottmiller e-mailed Pullman agreeing to accept to three hospitals agreement, even absent the MOU, to present. A remedy granting

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bargaining costs to UHW is supported by Prime's egregious conduct, which contaminated the core of the bargaining process to such an extent that traditional remedies simply cannot eliminate the toxicity of Prime's conduct. See *Unbelievable, Inc.*, 318 NLRB 857, 859 (1995); *Whitesell Corp.*, 357 NLRB No. 97, slip op. at 5 (Sept. 30, 2011); *Fallbrook Hosp. Corp.*, 360 NLRB No. 73, slip. op. at 2 (Apr. 14, 2014).

Here, Prime's bad faith conduct was egregious. Prime reached out to UHW, proposing to resolve the three hospitals agreement without any conditions. UHW committed resources to finalizing the agreement, ratifying the agreement and implementing the agreement. After reaching a deal, UHW cancelled bargaining sessions at the request of Prime. Prime's whole course of conduct was calculated to extort an agreement covering workers at the Daughters of Charity, a group of workers that were not even employed by Prime. Reddy was never interested in bargaining in good faith for a contract covering the three hospitals that he owned; he only agreed to a deal covering the three hospitals so that he could extort from UHW a deal covering another hospital, the Daughters of Charity. As such, Prime's conduct was an abuse of the bargaining process.

In addition, despite the numerous bargaining violations against Prime, including the fact that an ALJ has found that Prime unlawfully declared impasse and unilaterally implemented its last proposal on Centinela employees, Prime continues to engage in tactics that undermine and thwart the bargaining process. After the parties had submitted post-hearing briefs in this matter, the Board affirmed the ALJ's ruling. *See Prime Healthcare Centinela*, 363 NLRB No. 44 (2014).

2. Litigation Expenses.

UHW should be awarded litigation expenses because Prime's defense was frivolous and without merit. The conduct that led to UHW filing the charge spilled over to the hearing on this charge. At the hearing, Prime repeatedly misrepresented material facts and this behavior constituted bad faith. The Board has awarded litigation expenses where, as here, a party raises frivolous defenses or its conduct of the litigation manifests bad faith. *See HTH Corp.*, 361 NLRB No. 65, slip op. at 3-4 (Oct. 24, 2014) (awarding litigation expenses in the face of pervasive, repeated, and unremedied violations); *Camelot Terrace*, 357 NLRB No. 161, slip op. at 4 (Dec.

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30, 2011) (awarding litigation expenses for, among other things, for relying on "transparently nonmeritorious defenses"); *Teamsters Local 122*, 334 NLRB 1190, 1193 (2001) (awarding litigation expenses for conducting wasteful cross-examination and failure to mount any real defense); see also *Alwin Mfg. Co.*, 326 NLRB 646, 647 (1998) (awarding litigation expenses because party exhibit bad faith conduct in conduct of litigation), enf'd by, 192 F.3d 133 (D.C. Cir. 1999).

The issue in this case does not turn on credibility, so the resolution of this case does not depend on the conflicting testimony. Prime's actions either violated the Act or did not violate the Act, as a matter of law. In an effort to convince the ALJ that it did not violate the Act, Prime disingenuously argued that only Reddy had the authority to make a deal with UHW, and called two witnesses to proffer such evidence. Based on this evidence, the explicit suggestion was that Schottmiller did not have the authority to make a deal with UHW. This, of course, turned out to be completely false, since Reddy instructed Schottmiller to accept and execute the agreement without any conditions. (Tr. 405:12-19).

Prime's other defenses were equally frivolous. Prime's claim that there was no agreement because Schottmiller only said "absent an MOU" and not "absent the Daughters' deal" is absurd and defies logic. In addition, Prime's claim that there was not an agreement, because Schottmiller made a mistake is equally frivolous. As an initial matter, in order to accept this argument, one would have to accept that Schottmiller indeed had authority to negotiate the agreement, which Prime vigorously disputed at the hearing. But, more importantly, one would have to ignore the mountain of evidence that demonstrates that the parties reached an agreement, and that Prime simply refused to sign the agreement because Reddy wanted to force UHW into agreeing to a deal for Daughters.

Prime's abuse of the subpoena process also supports an award of litigation expenses. Prime's subpoena for documents sought not only privileged information, Section 7 protected material, but also totally and completely irrelevant material, like communications between UHW and the California Attorney General. Prime did not even bother to offer into evidence the one document that was produced by the Union.

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Finally, Prime's history of repeated bad faith bargaining is a militating factor in favor of an award of litigation expenses. *See, e.g., Prime Healthcare Centinela*, 363 NLRB No. 44 (2014).

Accordingly, UHW requests that Prime reimburse the General Counsel and the Union for costs and expenses incurred in the investigation, preparation, presentation, and conduct of the present proceeding before the Board, including reasonable counsel fees, salaries, witness fees, transcript and record costs, printing costs, travel expenses and per diems, and other reasonable costs and expenses.

The employer should also be required to comply with the agreement. Simply executing it sometime long in the future does not fully remedy the employer's unlawful refusal to execute. It must be ordered to also remedy the violation by complying with the agreement that was reached on November 10, in its entirety.

The remedy should include the following.

The employer should be required to post permanently the Board's ill-fated employee rights notice. (https://www.nlrb.gov/poster). The Courts that invalidated the rule noted that such a notice could be part of a remedy for specific unfair labor practices. It is time for the Board to impose the requirement for a lengthy posting of that notice as a remedy for unfair labor practices.

Additionally, any notice that is posted should be posted for the period of time from when the violation began until the notice is posted. The short period of 60 days only encourages employers to delay proceedings, because the notice posting will be so short and so far in the future.

The Notice should be included with any payroll statements. *See* Cal. Labor Code § 226.

The Board's Notice and the Decision of the Board should be mailed to all employees. Simply posting the notice without further explanation of what occurred in the proceedings is not adequate notice for employees. The Board Decision should be mailed to former employees and provided to current employees.

Notice reading should be required in this matter. The ALJ's proposed reading should be modified. That Notice reading should require that a Board Agent read the Notice and allow

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employees to inquire as to the scope of the remedy and the effect of the remedy. Simply reading a Notice without explanation is inadequate. Behavioralists have noted that, "[t]aken by itself, face-to-face communication has a greater impact than any other single medium." Research suggests that this opportunity for face-to-face, two-way communication is vital to effective transmission of the intended message, as it "clarifies ambiguities, and increases the probability that the sender and the receiver are connecting appropriately." Accordingly, a case study of over five hundred NLRB cases, commissioned by the Chairman in 1966, strongly advocated for the adoption of such a remedy, recommending "providing an opportunity on company time and property for a Board Agent to read the Board Notice to all employees and to answer their questions… " The employer should not be present. The Union should be notified and allowed to be present. The Union is the bargaining representative. To read the notice in its absence undermines its status. This should be on work time and paid. If the employees are working piece rate the rate of pay should be equal to their highest rate of pay to avoid any disincentive to attend the reading.

The traditional notice is also inadequate. The standard Board notice should contain an affirmative statement of the unlawful conduct. We suggest the following:

> We have been found to have violated the National Labor Relations Act. We illegally refused to sign and implement an agreement which we agreed to with the Union that represents you. We have agreed to sign and put that agreement into effect.

Absent some affirmative statement of the unlawful conduct, the employees will not understand the arcane language of the notice. Nor is the notice sufficient without such an admission. In effect, the way the notice is framed is the equivalent of a statement that the employer will not do specified conduct, not an admission or recognition that it did anything wrong to begin with.

The Notice should require that the person signing the notice have his or her name on the notice. This avoids the common practice where someone scrawls a name to avoid being identified with the notice, and the employees have no idea who signed it.

The employees should be allowed work time to read the Board's Decision and Notice. To require that they read the Notice whether by email, on the wall or at home on their own time is to

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punish them for their employer's misdeeds.

VI. CONCLUSION

For the reasons suggested above, these Cross-Exceptions should be granted. The Remedy is inadequate. The ALJ's mistake with respect to the California Differential should be corrected. The Board should return to its early days when it correctly identified such reprehensible conduct as terroristic activities. *See* headnotes to *Alabama Mills, Inc.*, 2 NLRB 20 (1936); *Jones & Laughlin Steel Corp.*, 1 NLRB 503 (1936); and *Brown Shoe Co., Inc.*,1 NLRB 803 (1936).

Dated: April 14, 2016

Respectfully Submitted,

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PROOF OF SERVICE
(CCP §1013)

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction the service was made. I am over the age of eighteen years and not a party to the within action.

On April 14, 2016, I served the following documents in the manner described below:

BRIEF IN SUPPORT OF CHARGING PARTY'S CROSS-EXCEPTIONS TO THE DECISION OF THE ADMINISTRATIVE LAW JUDGE

X (BY U.S. MAIL) I am personally and readily familiar with the business practice of Weinberg, Roger & Rosenfeld for collection and processing of correspondence for mailing with the United States Parcel Service, and I caused such envelope(s) with postage thereon fully prepaid to be placed in the United States Postal Service at Alameda, California.

X (BY ELECTRONIC SERVICE) By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from rfortier-bourne@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on April 14, 2016, at Alameda, California.

/s/ Rhonda Fortier-Bourne
Rhonda Fortier-Bourne

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